UNPOPULAR CHARITABLE PURPOSES

PROBABLY the great majority of charitable trusts are "popular"—that is, are trusts the purposes of which are consonant with most people's ideas of what is worthwhile and beneficial. This study is primarily concerned with the problems which arise where the purpose of the trust in question is clearly "unpopular"—that is, where most people, and probably the courts too, would say of the trust, "We are absolutely convinced that the doctrine is false," or, at least, "What an utter waste of good money this is in an unimportant cause." As is so often true, the problem resolves itself into a question of where to draw the line. On the one hand, courts should not allow substantial amounts of property to be tied up in advancing some doctrine which is unsound, but, on the other hand, it is of the utmost importance that no worthwhile cause be condemned as not charitable because of the short-sightedness of a court.

The results of going too far in upholding borderline purposes as charitable are serious; calling a trust "charitable" has at least three more or less important consequences. First, it results in tax immunities of various sorts, under most statutes. And it is, of course, false reasoning to say to this that there is no harm in being liberal about tax exemptions, for that is in effect being liberal with the tax-rate on all other taxpayers. Before a court thus affects the public tax-rate it should make sure that it is doing so in a worthwhile cause. Second, in most jurisdictions charitable enterprises are not in general liable for their torts. The policy in favour of exempting such enterprises from liability should be very strong before a court deprives the injured party of any possibility of redress. It has been argued that charitable trusts are favoured too much by the law as it now stands,[1] but however true that may be, we should in any case be very careful not to extend this cloak of protection to cases in which it is not clearly justified. Third, and probably most important, the label of charity allows the property in question to be devoted in perpetuity to the purposes set forth. As Scott points out,[2] a liberal exercise of the *cy-près* power can provide relief, where it later becomes evident that the purpose of the trust was unsound. However, some jurisdictions have been exceedingly reluctant to adopt the *cy-près* doctrine, in which case the holding of the trust invalid long after its

[1] "Charities: A Study in Fiction and Favor" in 25 *Virginia Law Review* (1939), at pp. 351 ff.

[2] Scott, *Trusts*, sec. 374.7.

creation would raise great difficulties in the proper distribution of the *res*.[3] Furthermore *ex hypothesi* property has in the meantime been used for a completely unproductive purpose (unless proving the purpose of the trust to have been unsound has for some reason been of value).

On the other hand, a very forceful argument can be put in favour of great liberality in dealing with these "unpopular" trusts. In the first place, as the *Restatement* has pointed out,[4] the fact that charitable trusts may be used for experimental tests of ideas which are thought by most to be of a very dubious nature is one of their greatest advantages. If private persons are not permitted to devote their property to testing and advancing such causes merely because most people do not believe in them, many developments that may be truly worthwhile, many new ideas that may be of tremendous benefit to the community may never be popularized. For such causes are just those which the government is not justified in supporting or espousing.[5] In addition, it is believed that it is exceedingly unwise policy for courts to inject their own judgment any more than is absolutely necessary into this question of the merits of the cause which the donor is seeking to advance. To do so would be to exercise a power which courts should not assume, and no matter how fairly they believe they are using their judgment, the least scintilla of intolerance may quickly lead to a very unwholesome official bias. It is a matter of common knowledge how often the intolerance of an ignorant majority of the public has retarded the adoption of useful scientific discoveries. The courts have done well to bridle to a greater extent than has the public a like instinct to doubt the truth of generally unaccepted ideas.

ATTEMPTS AT DEFINITION

The various definitions that have been formulated by the courts and others of what constitutes a charitable purpose are of little help in connexion with our specific problem. Whether rightly or wrongly, it has always been considered that the purposes which are to be considered charitable are in general those set forth in the preamble to the statute of Elizabeth.[6] Thus one of the earliest definitions of charitable purposes was that set forth by Grant M.R.: "those purposes are considered charitable, which that statute enumerates, or which by analogies are deemed

[3]Cf. *Cunnack* v. *Edwards*, [1896] 2 Ch. 679; *Braithwaite* v. *Attorney-General*, [1909] 1 Ch. 510—resulting trust where purposes of express trust do not exhaust the *res*. Held in those cases, the *res* goes to the crown as *bona vacantia*.

[4]American Law Institute, *Restatement of Trusts*, sec. 374 (i).

[5]Scott, *Trusts*, sec. 374.7.

[6](1601) 43 Eliz., c. 4.

within its spirit and intendment."[7] A later definition, on which the English courts have mainly relied since, is that of Lord Macnaghten: "charity in its legal sense comprises four principle divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."[8] A third definition is that of the *Restatement:* "a trust for the promotion of purposes which are of a character sufficiently beneficial to the community as to justify permitting property to be devoted forever to their accomplishment is charitable."[9]

These are but three of the many definitions that have sought to pin down the class of purposes which the courts will deem charitable.[10] It has been pointed out that it is practically impossible to define a charitable purpose,[11] and no further attempt to do so will be made here, especially since our purpose is not a general discussion of what constitutes a charitable purpose. However, with respect to the specific problem involved, the *Restatement* has laid down certain helpful criteria:[12] that a trust tending to the advancement of education is charitable unless the doctrine or belief involved is "irrational," and that a trust to promote an "unpopular" cause will be considered charitable so long as "the general purposes for which [it] is created are such as may be reasonably thought to promote the social interest of the community."[13]

"UNPOPULAR" RELIGIONS

There is no class of cases which shows more clearly the tremendous growth of tolerance in the last few centuries. The English law relating to religious toleration has been a continuous march from the time when mere worshipping according to any religion but the king's was unlawful, to the latest development that Roman catholic masses are among charitable purposes.[14] It is beyond the scope of this study to outline the development of the English law in this respect.[15]

[7] *Morice* v. *Bishop of Durham*, (1804) 9 Ves. 399, at p. 405, affirmed (1805) 10 Ves. 521.

[8] *Commissioners of Income Tax* v. *Pemsel*, [1891] A.C. 531, at p. 583, quoted with approval in *Re Hogle*, [1939] O.R. 425.

[9] Sec. 374.

[10] See Horace Binney *arguendo* in *Vidal* v. *Girard's Executors*, (1844) 2 How. 127, 11 L. Ed. 205, discussed in Scott, *Trusts*, sec. 348, n. 1; *Restatement*, sec. 368; *Weatherby* v. *Weatherby*, (1927) 53 N.B.R. 403; *Re Knowles; Leggat Case*, [1938] O.R. 369, [1938] 3 D.L.R. 178.

[11] *In re McClellan's Will; Robinson* v. *McClellan*, (1918) 46 N.B.R. 161.

[12] *Restatement of Trusts*, sec. 370 (h).

[13] *Restatement of Trusts*, sec. 374 (i).

[14] *Re Caus*, [1934] Ch. 162; *Re Hallisy*, [1932] O.R. 486, [1932] 4 D.L.R. 516.

[15] For a description of this development, see Scott, "Charity for the Heterodox" in 23 *Case and Comment* (1917), at p. 961.

The leading case in this field is *Thornton* v. *Howe*,[16] in which the testatrix provided that the residue of her estate, both real and personal, should go to an individual, "the proceeds [to be] applied for and towards the printing, publishing and propagation of the sacred writings of the late Joanna Southcote." It appeared that Miss Southcote had been a sincere Christian, but had laboured under the delusion that a second shiloh or messiah was to be born of her body, and that she had been inspired by the Holy Ghost to write of the coming miracle. The court found that "though her works are in a great measure incoherent and confused, they are written obviously with a view to extend the influence of Christianity."[17] The testatrix's heir sought to establish a resulting trust in his favour, partly on the ground that the trust was void as being charitable under the Statute of Mortmain.[18] Sir John Romilly M. R. held as to the realty that the trust was charitable, and hence void under the Statute of Mortmain. The court pointed out, however, that its decision as to the purpose of the trust being charitable was only *a decision under the Statute of Mortmain*, and that a trust will be considered charitable under the Statute of Mortmain as long as it *purports* to have a religious purpose, even though the particular sect for which the trust is created may be of such a nature as to be considered actually unlawful, as, for example, having an immoral tendency. The statement is merely a *dictum* to the effect that the purpose would be considered charitable in the general sense as well, but it is nevertheless a leading case on this point, and has been widely followed and never doubted. It is well to note the reasoning on which the court reaches its conclusion: "If the tendency were not immoral, and although this Court might consider the opinions sought to be propagated foolish or even devoid of foundation, it would not, on that account, declare it void, or take it out of the class of legacies which are included in the general terms charitable bequests . . . . " The rule laid down there is that any teaching in the field of religion which is sincerely believed in by the person who desires to advance it will be considered a charitable purpose, so long as it is not immoral. It is submitted that the court should have limited the rule to teachings which are not "irrational," or "unreasonable."[19] I am sure, for example, that the master of the rolls would not have countenanced Father Devine though his teachings would come within the rule laid down.

The next religious sect to be considered is the Church of Christ,

[16](1862) 31 Beav. 14.

[17]*Ibid.*, at pp. 20, 21.

[18]9 Geo. II, c. 36.

[19]Cf. *Restatement of Trusts* in notes 12 and 13, *supra*.

Scientist, better known as Christian Science. Although it is now clear that trusts to promote Christian Science are charitable, there was some little doubt about it when the courts were first presented with the question. The earliest case in which the issue came up was *Glover* v. *Baker*.[20] This was a bill for instructions brought by the executor under the will of Mary Baker Eddy, who had given part of the residue of her estate toward the propagation of Christian Science. The bill, which was heard on demurrer, alleged that the practice of Christian Science had in many cases prevented sick persons from being treated, and it was admitted that resort to a physician was preferable to the "treatment" afforded by Christian Science in many cases. It further appeared that the teachings of the church did not counsel resort to a physician until it had been shown that the patient failed to experience the healing power of Christian Science. Considering how serious such a delay could be, for example, in the case of a burst appendix, the court had difficulty in finding that Christian Science was lawful. The court argued, in defeating the contention that Christian Science was unlawful as inimical to the public health, that any harm done by the practice of Christian Science was due alone to the negligent application of it; and that it was, therefore, a matter for the legislature to regulate if it thought fit, but not a matter which the courts should hold not charitable solely on grounds that it resulted in harm on occasion.

Five years later an Ontario court was presented with the same problem, in *Re Orr*,[21] and held a bequest to the Mother Church of Christ, Scientist, to be charitable. In this case, however, the "unpopular" aspect of the religion was more acutely raised, for the same court had previously decided[22] that under the Canadian Criminal Code it was a criminal offence for a parent to fail to supply its child with medical necessities, without lawful excuse; and that the sincere belief of the accused, who was a Christian Scientist, that mental treatment in accordance with the tenets of his sect was the proper treatment for his sick child, would not constitute a lawful excuse under the statute. The court held, however, that this did not render the practice of Christian Science unlawful in Ontario; that the religion did not expressly counsel violation of a statute; and suggested that in any case there was no law against a person's experimenting on his own health to a limited extent. This is a rather nugatory sort of recommendation for the practice of

[20](1912) 76 N.H. 393, 83 Atl. 916 (1912).

[21](1917) 40 O.L.R. 567; reversed as to another part of the decision, *sub nom. Cameron* v. *Church of Christ, Scientist*, (1918) 43 D.L.R. 668.

[22]*Rex* v. *Lewis*, (1903) 6 O.L.R. 132.

Christian Science. At any rate, it now seems clear that Christian Science is a charitable purpose.[23]

Another religious sect about which there was at one time grave doubt was that of the New Jerusalem. The question was first raised in *Kramph's Estate*.[24] Property worth about $40,000 at the time of suit had been left to found a University of New Jerusalem, to teach the religious doctrine laid down in the writings of Swedenborg. Two exhaustive lower court opinions in the same case[25] give in great detail the evidence on which the decision in the supreme court was based. It appears from these decisions that the doctrine of the New Jerusalem was pretty clearly of a religious nature; it would seem, however, that the doctrine was to a great extent based on the all-importance of conjugal love. In Swedenborg's writings this *desideratum* was considered of such value, that if a married man was justified in denying his wife his bed, he should take to himself a regular mistress in his wife's place. Furthermore, the grounds given as justifying such denial were legion. The supreme court, however, held that the trust was not in any of its parts against public policy; it was, therefore, charitable as a religious trust. Most of the opinion deals with other points, and indeed very little is said on the merits of the purpose of the trust. Considering the many pages devoted to a heated discussion in the lower court of this question, and that that court had held the purpose of the trust to be against public policy, it is remarkable that the supreme court disposed of the matter[26] in one short paragraph: that, though some of Swedenborg's writings could be construed as "obnoxious to certain of our common standards of morality, yet it does not appear" that such part was included in the doctrines of the New Jerusalem. Although the court is to be commended for the result it reached, the decision cannot but be considered a *tour de force*, in view of the evidence discussed by the lower court, and the fact that the testator had specified "the doctrine of the New Jerusalem, as laid down in the writings of the Honorable Emanuel Swedenborg."

The general problem here is reminiscent of the problem of Christian Science; a doctrine which is in the main a perfectly valid religious doctrine, but which is marked by one aspect which seems very close to being irrational or against public policy. In the case of Christian Science it was the fact that practice of the doctrine, at least as originally taught,

[23]For example, *In re Smith's Estate*, (1933) 144 Ore. 561, 25 Pac. (2nd) 924, so assumes, virtually without argument.

[24](1910) 228 Pa. 455, 77 Atl. 814.

[25]25 *Lanc. Law Rev.*, 289; 26 *Id.*, 137. (These opinions had both held the trust void as against public policy.)

[26]228 Pa. 455, at p. 459; 77 Atl. 814, at p. 815.

was bound to be dangerous in certain cases (at least it is believed that it would be irrational to deny flatly this assertion). In the case of Swedenborg's writings, it was the fact that an important element of the religious belief was a practice which would seem quite clearly to be against public policy. In each case the court tended to circumvent these difficulties, instead of attempting to deal with them directly. Yet we cannot but think that the result reached in each case was correct. Possibly the courts have had in mind, in such cases as these, that a new idea of any sort should not be taken too literally, since the passage of time is apt to temper its more radical aspects. Furthermore, the courts have long been aware that the trends in public opinion are such that a doctrine frowned on at the time of the decision may soon be looked on with public approbation. And compare the suggestion of the New Hampshire court in *Glover* v. *Baker*, that if certain phases of Christian Science, or its practice, are against the state's public policy, the court should not strike the doctrine down on that account but should leave the question to the legislature to regulate the practice if such regulation is considered desirable. In *Re Knight*[27] the supreme court of Ontario had the same question before it. However, the case adds little, if anything, to the decision in *Kramph's Estate.* In the first place, the court held the gift was not in fact a perpetuity, and so the decision on the question whether propagation of the faith of the New Jerusalem is charitable was *obiter.* In the second place, the case was not as difficult to decide on its facts as was the Pennsylvania case, for the immoral tendency of certain phases of the doctrine was not brought out in the evidence. And, finally, the court did not consider the problem very carefully. *Thornton* v. *Howe*, is mainly relied on, on the theory that in both cases there was nothing anti-Christian, but merely much that most people would call unsound.

The doctrines of the Mormon church came before the supreme court of the United States in *Mormon Church* v. *U.S.*[28] In 1887, congress had passed an act (24 Stat. 635, c. 397) which repealed the act of incorporation of the church and directed that it be wound up. The court held that the act of 1887 was within the power of congress, and the property of the church passed to the United States, subject to the doctrine of *cy-près.* The court's remarks on the issue of public policy are instructive:

> One pretence for this obstinate course [practising polygamy in defiance of United States law] is, that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and, therefore under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea.

[27][1937] 2 D.L.R. 285.
[28](1889) 136 U.S. 1.

> . . . The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious [*sic*] to condemnation and punishment by the civil authorities.[29]

DENIAL OF RELIGION

We now proceed to discuss purposes which involve the investigation or propagation of doctrines denying the validity of the Christian faith, in whole or in part. The early cases had gone so far as to lay down the rule that it was unlawful to utter words denying the validity of the Christian faith. The basis for these decisions seems to have been that Christianity was "part of the law of" the jurisdiction in question. Thus it was held in *Pringle* v. *Napanee*[30] that the giving of lectures on such subjects as "Evolution v. Creation," "What liberalism offers as a substitute for Christianity," etc., was unlawful, so that the town was justified in refusing to carry out its contract to permit a series of such lectures to be given in the town-hall. This case was followed, with some doubt as to its validity, in *Kinsey* v. *Kinsey*[31] where it was held that the "promotion of Free Thought and Free Speech in the Province of Ontario" was an unlawful purpose.

A line of Pennsylvania case, however, illustrates the breaking down of this strict rule. In *Updegraph* v. *Commonwealth*,[32] the supreme court of the state had early adopted this rule. This case was followed by *Zeisweiss* v. *James*, in which the court went out of its way to state that a trust for the purpose of propagating ideas contrary to the Christian faith could not *in the nature of things* be considered charitable.[33] Of course, the rule that such a trust is actually unlawful includes necessarily a holding that the trust cannot be sustained as charitable.

However, ten years later, in *Manners* v. *Philadelphia Library Co.*,[34] the court appears to have become somewhat less strict. In that case, a doctor had left the residue of his estate to trustees to purchase a lot, erect a building on it, and convey it to the Philadelphia library. There

[29]At p. 49. The first amendment to the constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Compare with this the case of *Pramatha Nath Mullick* v. *Pradynmua Kumar Mullick*, (1925) L.R. 52 Ind. App. 245, where the privy council was perfectly willing to hold that the personal desires of an Indian idol be taken into account in deciding the case, and that a next friend should be appointed to appear for the idol and express its will.

[30](1878) 43 U.C.Q.B. 285.

[31](1894) 26 O.R. 99.

[32](1824) 11 S. & R. 394.

[33](1870) 63 Pa. 465, at p. 470.

[34](1880) 93 Pa. 165.

were two conditions imposed on the library with respect to the gift: (i) that no work be excluded from the library "on account of its difference from the ordinary or conventional opinions on the subjects of science, government, theology, morals or medicine, providing it contains neither ribaldry nor indecency"; (ii) to publish, at least every ten years, editions of the testator's works exactly as he left them. It was alleged that his works contained atheistical and infidel statements, and denied the existence of God. Held, on demurrer, that the first condition was precatory, and that the second was void, on the authority of *Zeisweiss* v. *James*. The court thus refused to step down from the earlier decision. However, in discussing the first condition it took a much more reasonable attitude when it said that even had that condition been mandatory, it would have been valid:

> It can hardly be said that the interests of Christianity and sound morality require that the student of morality shall be debarred access to all books that may be regarded as objectionable from an orthodox standpoint. He is best armed to defend Christianity who is familiar with arguments. To enforce such a rule would exclude from this library a vast amount of the choice literature of the past; the works of authors who merely wrote according to the light of their day and generation. We may now safely enjoy all that is good of their writings. The world has outgrown their errors.[35]

Several years later the orphans' court in *In Re Knight*,[36] seems to have added something to the Pennsylvania law on the subject. The testator had left $1,000 to the Friendship Liberal League, whose purpose was to "promote by all peaceable and orderly means, active propagandism of the great principles of religious liberty, etc." It appeared that this was, in fact, done by means of public meetings and lectures, and that such lectures had, in fact, included an invective against the Christian religion. The court held the gift charitable, and hence void under a statute regulating charitable bequests.

The earliest case raising this question in England was *Briggs* v. *Hartley*.[37] There the testator had given a legacy of £300 in trust to be laid out for a prize for the best essay on "natural theology, treating it as a science, and demonstrating the truth, harmony, and infallibility of the evidence on which it is founded, and the perfect accordance of such evidence with reason; also demonstrating the adequacy and efficiency of natural theology when so treated and taught as a science to constitute a true, perfect, and philosophical system of universal religion." The vice-chancellor (Sir Lancelot Shadwell) said: "I cannot conceive

[35] *Ibid.*, at p. 174.

[36] (1891) 10 Pa. Co. Ct. Rep. 225; excep. dismissed, 13 Pa. Co. Ct. Rep. 405; aff'd 159 Pa. 500.

[37] (1850) 19 L.J. Ch. (N.S.) 416.

that the bequest in the testator's will is at all consistent with Christianity; and, therefore, it must fail." It seems clear, from the arguments of counsel and from the facts of the case, that the holding was not only that the gift was not charitable, but that it was actually unlawful. It is a good indication of the strict attitude of the courts at that time, with respect to religious doctrine.[38]

In 1917, however, the house of lords in *Bowman* v. *The Secular Society*,[39] overruled *Briggs* v. *Hartley*. In this case there was a bequest to the Secular Society, Limited. It was urged that the gift was void on the ground that the society was illegal. The purposes of the society were, *inter alia*, "to promote . . . the principle that human conduct should be based on natural knowledge, and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action; . . . to promote the secularization of the State; . . . to promote universal secular education, without any religious teachings, in public schools; . . . to promote the recognition by the state of marriage as a purely civil contract . . . . " It was held unanimously that to deny Christianity is not a criminal offence, unless scurrility is involved, and four of the five lords held further that the purposes of the society were not illegal in the sense that a bequest to it would be considered void. Lord Finlay L.C. dissented, relying on *Briggs* v. *Hartley*. He argued in general that Christianity was still part of the law of England, and that, though there might have been a change in public opinion since the time of *Briggs* v. *Hartley*, a change in the law lay with the legislature.

The case quite clearly does not decide whether such a gift would have been considered charitable. Only two of the lords even referred to the question. Lord Summer merely pointed out that this was an entirely different question. Lord Parker of Waddington did discuss the question at some length, and came to the conclusion that none of the purposes of the society could be considered charitable. It is quite clear on the English law that all purposes above mentioned except the first would not be considered charitable, as seeking to effect a change in the law (see *infra* for English law on this subject). And as to the first purpose, "to promote the principle that human conduct should be based upon natural knowledge and not upon super-natural belief, and that human welfare in this world is the proper end of all thought and action," Lord Parker says this is not charitable. He commenced by observing that it does not fall within the enumeration of the statute of Elizabeth, and that it was not a religious trust. However, he seemed to base his

[38]But cf. *Thornton* v. *Howe*, (1862), *supra*.
[39][1917] A.C. 406.

ultimate decision that the purpose is not charitable on the fact that it would, in his opinion, be "quite impossible to hold that a trust to promote a principle so vague and indefinite was a good charitable trust."[40] It is submitted that the best possible definitions of many other philosophical doctrines must be fully as vague as this, and that Lord Parker took a rather narrow view of the question. At any rate, the case is not of much help on the direct question whether promotion of secularism is a charitable purpose. As the law now stands in England, it must probably be said that it is not.

In 1907, in *Re Jones*,[41] the supreme court of South Australia had before it a case which had the best chances to date of bringing forth a clear-cut decision on secularism as a charitable purpose; since a finding on whether it was a charitable purpose was necessary to a decision of the case, and the court was not troubled with such a hard-and-fast rule as that governing the Pennsylvania and Ontario courts: that Christianity is a part of the law. The testator had given a remainder interest in his estate to trustees for the benefit of the Incorporated Body of Freethinkers of South Australia, for the purpose of propagating and spreading the society's doctrine in South Australia. The society had gone out of existence before the testator's death, and it therefore became necessary to decide whether the trust was for a charitable use. The doctrine of the society's faith was "to disseminate, popularize and promote, by lawful means," much the same principles as those advocated by the society involved in *Bowman* v. *The Secular Society*.

The court held that the purpose was not charitable. The method of approach used and some of the arguments of the court are worth examining. The court first mentioned the part played by the statute of Elizabeth: an enumeration which serves as the starting-point to indicate whether a given purpose is charitable. The judgment then stated the definition (if it may be called such) given by Lord Macnaghten in the *Pemsel Case*,[42] and ran through the four categories there set forth, to consider whether the purpose in question fell within any of them. It was held without much difficulty that this was no trust for the relief of poverty nor for the advancement of religion, and that it was not for the advancement of education, since that had always been taken to mean the actual imparting of knowledge, or assistance in the imparting of it. This left the most doubtful question, under Lord Macnaghten's definition: was it within "trusts for other purposes beneficial to the community, not falling under any of the preceding heads?" On this

[40][1917] A.C. 406, at p. 445.
[41][1907] S. Austr. L.R. 190.
[42][1891] A.C. 531, at p. 583.

question, the court first discussed fully the problem of what criterion is to be taken for determining whether a purpose is "beneficial." They held that the belief of the creator of the trust that the purpose is beneficial to the community is not enough. In so holding, they traced the contrary notion back to a *dictum* of Lord Eldon in *Attorney-General* v. *Earl of Mansfield*,[43] and to a *dictum* of Chitty J. in *In re Foveau*.[44] The court argued that these *dicta*, to the effect that the creator of the trust is to be the sole judge of whether a trust is beneficial, were intended to be applied only where the trust is in an admittedly charitable field (e.g., education), and where the only doubt is as to the efficacy of the method of reaching the result. The court next cited *Re Cranston*,[45] which was said to have applied the above rule in holding promotion of vegetarianism charitable, and expressly dissented from the view there taken. The court next mentioned a *dictum* to the same effect by Lord Esher M.R. in *Regina* v. *Commissions of Income Tax*,[46] and observed that doubt had been cast on it by Lord Macnaghten when the same case went to the house of lords.[47] The decision of the court on this point then was that the bare belief of the settlor that the purpose of the trust is beneficial is not conclusive. It is submitted that such a decision is obviously correct, but that the court should have gone on to consider a somewhat more reasonable possible rule—one which it might have been more difficult to dismiss—that the settlor's belief that the purpose is beneficial will be honoured unless his belief in that respect was unreasonable. As has been pointed out earlier in this study, such a criterion probably reaches the best results, and it is believed also that the cases tend (with variations in approach, of course), to be more easily reconciled if viewed with respect to some such criterion.

Instead of pursuing the suggested line, however, the court went back to consider the statute of Elizabeth, and from there outlined the various general classes of charitable purposes, as developed by the decided cases. It rested its ultimate decision on the ground that no case had yet held the promotion of an abstract theory to be charitable, unless connected with some admittedly charitable field, such as education. Such a basis for the decision is unfortunate. It is submitted that the purpose of Lord Macnaghten's fourth category is to provide for cases which are *not* identified with one of the three traditional charitable classes, and that a promotion of a cause (call it an "abstract

[43](1826) 2 Russ. 501, at p. 521.
[44][1895] 2 Ch. 501, at p. 507.
[45][1898] 1 I.R. 431.
[46](1888) 22 Q.B.D. 296, at p. 308.
[47]*Commissioners of Income Tax* v. *Pemsel*, [1891] A.C. 531, at p. 583.

theory" if you will) which may benefit society should not be struck down as not charitable merely because it is not identified with religion, education, or relief of poverty.[48]

PHILOSOPHICAL DOCTRINES AND BELIEFS

The doctrines and beliefs which we shall now discuss are mainly spiritualism and theosophy, in one form or another. It will be seen that it is often difficult to classify these two "doctrines" as pure philosophies on the one hand, or more or less "crack-brained" beliefs on the other. Thus Webster[49] defines spiritualism, in part, as "2. The doctrine that all that exists is spiritual, idealism, especially metaphysical idealism. 3. A belief that departed spirits hold intercourse with mortals by means of physical phenomena, as by rapping, or during abnormal mental states, as in trances, or the like, commonly manifested through a medium . . . . " And theosophy is defined (in part) by the same work as: "1. Alleged knowledge of God and of the words as related to God arrived at neither by external historical revelation nor by scientific induction, but by direct mystical insight or by philosophical speculation or by a combination of both. 2. The doctrines and beliefs of a modern school or sect following, in the main, Buddhistic and Brahmanistic theories, esp. in teaching a pantheistic evolution and the doctrine of reincarnation."[49] The cases seem to have been consistent in holding that the purpose is charitable if it involves a purely philosophical doctrine, and that otherwise it is not charitable. The one possible exception is *Briggs* v. *Hartley*, discussed above in connexion with "denial of religion."

The New Jersey court of equity has had before it two cases involving this question. In the first, *Jones* v. *Watford*,[50] a testator had left his residue (about $3,500) to trustees "for the purchase of books upon the Philosophy of Spiritualism, not sectarian, or of any creed, church or dogma, but of free, liberal bearing." It was held that this was a charitable purpose, as being the purchase of books on a subject which was of wide interest. The court stated that no charge had been in fact made that the bequest had a tendency to immorality or irreligion, and indicated that under *Thornton* v. *Howe*, which the New Jersey court had already approved, such a charge could not be sustained in any event. The only opinion on this part of the case (that in 62 N.J. Eq.), was by a single vice-chancellor, and the full court affirmed without opinion, one

[48]See the note in 23 *Virginia Law Review* (1939), at p. 439.

[49]2 ed., unabridged (1934).

[50]62 N.J. Eq. 339, 50 Atl. 180; reversed on other grounds, (1901) 64 N.J. Eq. 785, 53 Atl. 397.

judge dissenting, as to this part. There seems to be no doubt that the decision was correct, although as a practical matter the small foundation which resulted from the bequest, at least if administered independently of any other, must have been rather impractical.

In *Vineland Trust Co.* v. *Westendorf*,[51] the same court had before it a testamentary gift directed to be applied "in the furtherance of the broadest interpretation of metaphysical thought, in whatsoever manner and by whatsoever means [the trustees] may jointly consider proper and best." After the decision in *Jones* v. *Watford*, the court had little trouble with this case. The only possible difficulty would have been that "metaphysical thought" is probably one of the vaguest descriptions that one can make. It may include everything from spiritualism to the analysis of experience.[52] However, this aspect of the case did not trouble the court. It was held that the broad latitude in the choice to be made by the trustees created no legal infirmity. Compare the *dictum* of Lord Parker of Waddington in *Bowman* v. *Secular Society*.

Spiritualism in the sense of a belief that departed spirits hold intercourse with mortals has twice come before the courts. In *Re Hummeltenberg*[53] the testator had given £3000 to the treasurer of the London Spiritualistic Alliance, Limited, "to form the nucleus of a fund for the purpose of establishing a college for the training and developing of suitable persons male and female as mediums, preference being given to healing mediums and those for diagnosis of disease, . . . " As this bequest created a perpetuity, it was necessary to decide whether it was given on a charitable purpose. Russell J. held the purpose was not charitable. It had been urged in argument that the purpose was charitable for two reasons: (a) it was for the advancement of education, i.e. its purpose was the education of an indefinite class of persons in a calling which was not unlawful; (b) it was for the benefit of the community under Lord Macnaghten's fourth class in the *Pemsel Case*, i.e. it tended to make available to the community a larger number of mediums.

For some reason, the court failed to mention the first above ground. And it was held that the trust was not charitable under the second ground, for two reasons: (i) the trust was not one which the court could undertake to administer, and (ii) the trust could not be said to be for the public benefit. On this latter point the court observes (at p. 241): "I am not satisfied that a gift for that purpose is or may be in any sense

[51](1916) 86 N.J. Eq. 343, 98 Atl. 314.

[52]See for example the numerous definitions by various philosophers and writers given under "metaphysics," in Webster.

[53][1923] 1 Ch. 237.

of the words operative for the benefit of the public"; and later (at p. 242) "It was contended that the Court was not the tribunal to determine whether a gift or trust was or was not a gift or a trust for the benefit of the public. It was said that the only judge of this was the donor of the gift. . . . " The court then referred to the *dictum* of Chitty J. in *In re Foveau*,[54] and the holding of the majority of the court in *Re Cranston*,[55] (mentioned above in the discussion of *Re Jones*) as supporting this proposition, and continued: "So far as the views so expressed declare that the personal or private opinion of the judge is immaterial, I agree; but so far as they lay down or suggest that the donor of the gift or the creator of the trust is to determine whether the purpose is beneficial to the public, I respectfully disagree." The court then suggested that the rule contended for would allow trusts in perpetuity for "all kinds of fantastic (though not unlawful) objects, of which the training of poodles to dance might be a mild example," and concluded: "In my opinion the question whether a gift is or may be operative for the public benefit is a question to be answered by the Court by forming an opinion upon the evidence." The evidence here consisted, it would seem, of a dictionary definition of "medium" comparable to the definition of "spiritualism" (sense 3 of Webster), and of a few rather weak affidavits by certain spiritualists expressing their belief in the results claimed by mediums.

It is submitted that the court has laid down no rule at all. The court has merely said that only the evidence before it will be used to determine the case—but that is if anything, a rule of evidence. A more crucial question is, on a given set of facts, what criterion will the court use in determining whether a trust deemed beneficial by the donor is a charitable trust? For example, the *Restatement* lays down the rule that such a trust is charitable unless the donor's belief is "irrational," or "unreasonable."[56] At any rate, the case probably has settled the English law to the extent that it may, before this case, have been tending toward the rule that the donor's opinion is conclusive. I doubt, however, that such a rule was ever really meant to be laid down in that extreme form.

The only other case in which spiritualism in this sense has come up is *In re Stephan's Estate*.[57] Money was there left to a spiritualists' association, in trust to keep up a spiritualist monument. The court first held that the upkeep of the monument was not a charitable object, as there was no showing that the monument was a public one. It was

[54][1895] 2 Ch. 501, at p. 507.
[55][1898] 1 I.R. 431.
[56]Notes 12 and 13, *supra*.
[57]129 Pa. Super. 396, (1937) 195 Atl. 653.

suggested that the association itself might be considered the object, and that the bequest, although in perpetuity, might be upheld on the ground that the objects of the association were charitable. The trial court had held that its objects were not charitable, and the superior court, in sustaining this finding, reviewed the evidence which had been presented to the trial court in some little detail. This evidence consisted almost entirely of testimony by an errant reporter and a magician's assistant about their experiences in investigating, *incognito*, various mediums, many of whom were members of the association in question. This testimony, entirely uncontradicted, included the recounting of many instances of fraud and trickery practised by the mediums in order to simulate the results which spiritualists contend are accomplished by intercourse with the spirits of deceased persons. The decision in the case would seem to be quite clearly right. It is unfortunate that frequently courts do not get such a wealth of pertinent evidence on which to base their decisions. If the same record had come up to the Irish court of appeal, it would have provided a crucial test for the rule which the majority of that court is alleged to have laid down in *Re Cranston*. If that rule was, as stated by Russell J. in *In re Hummeltenberg*, that the belief of the donor was conclusive, it is submitted that the Irish court would have been constrained to modify their rule on such a record as that of *In re Stephan's Estate*. It seems to me rather that the Irish court did not intend to lay down such an extreme rule in the first place, but instead a rule that the donor's belief as to whether the object of the trust is beneficial will govern unless his belief is "irrational," or is doubtful in some other similar degree.

Three cases have dealt with the question whether the teaching or practice of theosophy can be deemed a charitable purpose. The first two, *New England Theosophical Corporation* v. *Board of Assessors*[58] and *Korsstrom* v. *Barnes*,[59] dealt with societies which investigated or propagated Buddhistic and Brahmanistic theories coming within the second definition of Webster. Neither is a very strong case on the question involved in this study, but both cases indicate a real reluctance to hold such societies charitable, which appears to be largely induced by the unsoundness of the doctrine sought to be advanced.

The other case, *In re Carpenter's Estate*,[60] held that a trust to advance the other branch of theosophy defined by Webster is not charitable. The testator had left his entire estate (about $110,000) to his executor, in trust, that "the income shall be paid and disbursed to such highly

[58]172 Mass. 60, (1898) 51 N.E. 456.
[59](1909) 167 Fed. 216.
[60]163 N.Y. Misc. 474, (1937) 297 N.Y. Supp. 649.

evolved individuals, with much occult knowledge, who are ceaselessly working for the advancement of the Race and the allevia [*sic*] of the suffering of Humanity, as to him . . . may seem worthy, and be deemed wise." It was held that the gift was void as a non-charitable perpetuity. The surrogate decided that the testator had intended as objects of his bounty a certain class of persons high up in the cult of theosophy who are known as "adepts" or "masters." Most of the opinion is not of much help, but one passage voices what is to my mind an excellent indication of the nature of the criterion which should be applied in these "unpopularity" cases: "However sincere the believers of the cults of mysticism or theosophy or occultism in its higher sense, may be, the great body of opinion among sound thinking men and women rejects belief in the existence of occult powers in the individuals in a continuing form of manifestation" (at p. 477). I submit that a definition in some such terms as this would point the way to the proper line to be drawn in the "unpopularity" cases.

UNPOPULAR ECONOMIC AND POLITICAL DOCTRINES

The doctrine of socialism first came up before an English court. In *Russell* v. *Jackson*,[61] the testator had left the residue of his estate, ostensibly outright, to two persons. It was proved, however, that the donees were to hold on a secret trust for the purpose of establishing a school for the education of children in the doctrines of socialism, probably as taught by Robert Owen. The court seems to have held that the trust was either illegal or charitable, and as to the personalty that they would have to know more about the doctrines advocated by Robert Owen before they could determine whether it was illegal or charitable. There is thus no holding one way or the other on the question whether the doctrine could be a charitable object.

In *Peth* v. *Spear*, the Washington court was confronted with a similar problem.[62] That case arose out of the breaking up of a socialist society. It does not appear clearly what was the source of the society's property, but it does appear that the society was instituted near the close of the last century, and occupied agricultural land which was held by the trustees for the benefit of the society or its members. The nature of the society was expressed to be an "unincorporated association or body of persons acting together for the purpose of owning, acquiring, operating, conducting and maintaining a communal industrial institution, and the education of the people in the principles of socialism." Some years

[61](1852) 10 Hare 204.

[62]63 Wash. 291, (1911) 115 Pac. 164.

after its creation, the society disbanded and the land was sold. On an issue regarding the distribution of the proceeds, the court held that the property of the society had been donated to a charitable use, in that the purpose had been "to provide a place where the doctrines of socialism could be taught by example as well as by precept." The case is pretty clearly right—there is no doubt that such an enterprise as this is an educational purpose, and such "unpopularity" as socialism may have should not be allowed to bar it. It does not involve the type of "unpopularity" which arises from a belief in every sound mind that the object in question could not conceivably be beneficial to the community.

The writings of Henry George have twice come before the New Jersey court on the issue of their charitable nature. In *Hutchins* v. *George*,[63] a single vice-chancellor had held that a trust to disseminate Henry George's works on the land question was not charitable. In *George* v. *Braddock*,[64] the full court unanimously reversed this opinion. The broad doctrine of the works to be disseminated was that private ownership of land was odious, and should be abolished by any lawful means that were available. On this view of the doctrine which Henry George's works sought to advance, the holding was considering the early date commendably liberal. Even granting that the court did not agree with the Massachusetts rule with respect to trusts to change the law (see *infra*), still, advocating a change in the law to the extent of abolishing all private rights in real property was a purpose at which many courts would have balked in righteous indignation (see, e.g., the opinion of the lower court, in *Hutchins* v. *George*). It is interesting to note also, that the court upheld this as a trust tending to the advancement of education.[65]

The same object came before the Ontario supreme court in *Re Knight*,[66] where it was held that a gift to the Henry George foundation for the objects of the foundation was not charitable. The ground on which this result was reached, however, was that the objects of the foundation included agitation for a change in the laws, which rendered the trust not charitable under the English rule as to "political purposes." Otherwise, the court indicated, if anything, that the objects of the foundation would be charitable.

It is quite clear that, at least apart from any trouble raised by change of law, women's suffrage should be considered one of those political

[63] 44 N.J. Eq. 124, (1888) 14 Atl. 108.
[64] 45 N.J. Eq. 757, (1889) 18 Atl. 881.
[65] *In re Jones, supra*, is *contra* on this last point.
[66] [1937] 2 D.L.R. 285.

doctrines the advancement of which is a charitable purpose.[67] In this connexion, however, *Jackson* v. *Phillips*[68] might be mentioned, as indicating how a court is able to mould its rules to lead to the result which is desired. In that case the Massachusetts court managed to find that advocating a change in the laws was a charitable purpose where the change was the abolition of slavery, but not a charitable purpose where the change involved giving women the right to vote.[69] In spite of the grounds given in the opinion for the distinction between the two purposes, it is tolerably clear that the great popularity of the one, and the unpopularity of the other, must have had some influence on the court.

UNPOPULAR METHODS OF IMPROVING HEALTH

Several cases have come up involving the question whether the teaching, study, or practice of some unpopular branch of the field of medicine is charitable. *In re Hill's Estate*,[70] brings out nicely the problem that confronts a court in the case of a purpose which is clearly charitable except for the fact that it is quite clear that the *method* advocated by the donor is unwise. In that case property had been left by the testator in trust to invest it and use the income in order that a competent homeopathic physician might lecture at a medical school, to be selected by the trustees, the instruction and use of texts being confined to certain named material. The trial court found that the teaching and advocating of homeopathic principles, as they were presented in the books specified, would result in inadequate and even harmful treatment of diseases. The majority of the court held that on these findings of fact the gift was void as inimical to the public health. One judge dissented, taking a different view of the evidence. His opinion indicated an adherence in a rather strong case to the oft-repeated rule that a court will not consider the wisdom of the method the testator chooses for carrying out his charitable intent. It is impossible not to see a marked similarity between the evidence in the instant case, and that in the Christian Science cases, especially *Glover* v. *Baker*. If a court were required to distinguish the two types of cases their basis would presumably be the religious aspect of Christian Science. On the aspect of treatment of illness, however, and on the evidence presented, it would be difficult to distinguish *Glover* v. *Baker* from *In re Hill's Estate*.

There seems to have been little trouble in holding that the science

[67] *Garrison* v. *Little*, (1897) 75 Ill. App. 402.

[68] (1867) 96 Mass. 539.

[69] See the analysis of the opinion in this case to the same general effect in Scott, *Trusts*, sec. 374.4.

[70] 119 Wash. 62, (1922) 204 Pac. 1055.

of eugenics may be the subject of a charitable purpose.[71] There has been more criticism of birth control, however, and it might have been expected that this branch of medicine would not join the charitable group so easily. But it would seem that it must be held to be a proper subject of charity unless a valid objection can be made to it on moral grounds. And it is very improbable that such an objection would be sustained in this day and age.[72]

HUMANITARIAN PURPOSES

Vegetarianism first came before the courts in *Re Cranston*.[73] It was there held by the Irish court of appeal, one judge dissenting, that the devise of certain rents in perpetuity to two vegetarian societies was valid as being to a charitable use. The grounds on which the societies based their doctrine were apparently not only that the eating of flesh was cruel to the animals, but also that total abstinence from meats was beneficial to man, both from a medical and from an economic standpoint. The opinions are exceedingly interesting and helpful for the openness with which they face the problem and deal with it. Thus they did not rely particularly on the earlier cases which had held prevention of cruelty to animals a charitable purpose, but instead stated their own rule and decided the case on its own qualifications. It is submitted, however, that the only opinion which does not contain the objectionable aspect to which I have referred earlier is that of Lord FitzGibbon, one of the majority. Having come to the conclusion that the question is, whether vegetarianism is beneficial to the community, he continued:

> What is the tribunal which is to decide whether the object is a beneficent one? It cannot be the individual mind of a judge, for he may disagree, toto coelo, from the testator as to what is or is not beneficial. On the other hand, it cannot be the vox populi for charities have been upheld for the benefit of insignificant sects, and of peculiar people. It occurs to me that the answer must be . . . that the benefit must be one which *the founder* believes to be of public advantage, and his belief must be at least rational, and not contrary either to the general law of the land, or to the principles of morality.[74]

It is submitted that this is the most satisfactory statement yet made by a court with regard to the criteria to be used in the case of an unpopular charitable trust. It seems to me that this statement of the rule

[71] *In re Rockefeller's Estate*, (1917) 177 A.D. 786, 165 N.Y. Supp. 154; aff'd. (1918) 223 N.Y. 563, 119 N.E. 1061; *Collier* v. *Lindley*, (1928) 203 Cal. 641, 266 Pac. 526.

[72] *Slee* v. *Commissioner of Internal Revenue*, (1930) 42 F. (2d) 184. Birth Control League held not charitable under federal income-tax statute, but only because of its political activities. Strong *dictum* that otherwise the object is clearly charitable.

[73] [1898] 1 I.R. 431.

[74] [1898] 1 I.R. 446, at p. 447.

correctly and rationally reconciles the cases in the field, and best expresses the mental processes through which the courts go—the terms in which the courts tend to think—when a case of this nature comes before them. Like any statement of a rule, of course, it amounts to no more than a group of more or less definite words and concepts, and its application to a particular set of facts is a matter quite distinct from its formulation. Indeed, I disagree with the result reached in the instant case. However, I believe that the opposite result should have been reached on the basis of the rule above stated.

Lord Holmes, who dissented, laid down the rule that the question whether a purpose is beneficial to the public depends on whether the "common understanding" is that it is beneficial. It is submitted that such is not the law and is erroneous in principle; and that Lord Holmes could have reached the result he did on the rule laid down by Lord FitzGibbon. The English chancery division (Joyce J.) held a like disposition to be charitable in *Re Slatter*,[75] expressly following *In re Cranston*.

Other more acceptable forms of relief for animals have had less difficulty in the courts. These other forms have been generally of three types: (*a*) medical aid, (*b*) prevention of cruelty, (*c*) suppression of vivisection. The first of these was upheld as charitable by the court of appeal as early as 1857,[76] and the result seemed so clear that the lord chancellor thought the appeal "thoroughly without foundation," and Knight Bruce L. J. added, "I have no recollection of an appeal more plainly void of sense and reason." The institution in question was founded to aid only animals useful to mankind, and the decision was, therefore, based solely on a purely utilitarian benefit to mankind. The next case to come up, *Re Douglas*,[77] injected no new arguments into the field, and the opinion was *obiter* to the extent that it discussed the question at all, although it has often been cited as holding that protection of animals is a charitable purpose.

Re Foveau[78] is the leading English case on both the question of anti-vivisection and of prevention of cruelty to animals in general. The testatrix, having power to appoint among any charities she might choose, appointed to three anti-vivisection societies, whose primary purpose was to effect the repeal of a statute (39 - 40 Vict., c. 77) and thereby open the way to total abolition of vivisection. The basis for the stand of these three societies was a moral one: that the infliction of cruelty on animals is degrading to mankind, and its suppression is, therefore,

[75](1905) 21 T.L.R. 295.
[76]*University of London* v. *Yarrow*, (1857) 1 DeG. & J. 72.
[77](1887) 35 Ch. D. 472.
[78][1895] 2 Ch. 501.

beneficial to mankind. It was held by Chitty J. that this was a charitable object. He felt that the societies were "near the borderline," but that (*a*) the prevention of cruelty to animals is a charitable purpose for just the reason adopted by the societies, and (*b*) it is a matter of opinion whether vivisection under all circumstances is cruel—reasonable men may differ on the question, and, therefore, total abolition of vivisection may be considered a charitable object. As an original question, a good case might have been made out for the other side. The decision seems correct, however, and at any rate the case has been followed wherever the question has since arisen.[79]

A rather interesting case was presented by the facts of *Re Joy*.[80] The testatrix had left £1000 to a clergyman for the benefit of the Society for Supressing Cruelty by United Prayer. The society had gone out of existence at the testatrix's death, and the gift therefore lapsed. The question was whether it was a charitable gift so that the doctrine of *cy-près* might be applied to it. The court held that it was not charitable, on the ground that the purpose of the society had been to improve the individuals who prayed as members of the society. On the evidence it is hard to find any intent but to suppress cruelty to animals. On the whole, the purpose of the society seems to have been very similar to the purpose of Christian Science in its healing aspect, with the possible exception that the society contemplated *united* prayer. That being so, it is difficult to see how, on the decided cases, the society was not charitable. If anything, the religious aspect should tend to strengthen the charitable character of the purpose beyond the mere aspect of the relief it must be presumed to have afforded to animals.

Re Grove-Grady[81] is a further indication that the English courts realize they have gone rather far in the animal cases, and are not inclined to extend them. In that case, the testatrix left about £200,000 to trustees to found an institution, one purpose of which would be to acquire land as a preserve for any animals the committee of the institution might select for protection from human molestation and killing. Romer J. had held below that the gift was charitable, on the basis of the prior decisions regarding relief of animals. The court of appeal reversed, however, one judge dissenting. Lord Hanworth M.R. and Lord Russell, the majority, both seemed to go on the theory that in order to have a

[79]For example: *Re Gwynne*, (1912) 22 O.W.R. 405, 3 O.W.N. 1428, 5 D.L.R. 713 (anti-vivisection); *Re Wedgewood*, [1915] 1 Ch. 113 (prevention of cruelty and fostering of humane slaughtering); *Swifte* v. *Attorney-General*, [1912] 1 I.R. 133 (home for starving and forsaken cats); *Pitney* v. *Bugbee*, (1922) 98 N.J.L. 116, 892, 118 Atl. 780 (protection of animals by enforcement of laws).

[80](1888) 62 L.T. (N.S.) 175, 5 T.L.R. 117.

[81][1929] 1 Ch. 557.

charitable purpose, under Lord Macnaghten's fourth category in the *Pemsel Case*, it must be shown that benefit to the community "must necessarily result" from the execution of the trust. Unless they mean by this statement something to the effect that it must be shown *some people not unreasonably believe* that benefit "must necessarily result," I submit that they are misstating (or remaking) the English law. And if they do not mean something to that effect, it is very difficult to distinguish the earlier English cases, on the facts of the case. The master of the rolls made something of the fact that there was no direction in the will that the preserve be open to public inspection, and concluded from that that the project would not enure to the public benefit. In the first place, no case had theretofore insisted on this element. And furthermore, as Lord Lawrence observed in his dissenting judgement, the trustees could be relied upon to carry out the will in a manner reasonably calculated to accomplish the obvious purpose of the testatrix: to engender among mankind more humane treatment of animals. I do not believe, however, that the court intended by its decision to change the English law on the subject. Rather, they saw £200,000 tied up in a rather worthless venture, and decided that the cases had been stretched already to the breaking-point.

CHANGES IN EXISTING LAWS

This field has received much attention from law reviews and text-writers. I shall, therefore, not attempt a discussion of it except as it bears upon the general purpose of this study.[82] The Massachusetts court in *Jackson* v. *Phillips*[83] laid down the rule that a trust whose object was a change in existing laws would not be considered charitable, irrespective of the fact that a lawful means was to be employed to induce the change. This view prevails in England, but has often been rejected elsewhere.[84] It has been rejected by the *Restatement*,[85] and has been criticized by text-writers.[86] Lord Parker of Waddington in *Bowman* v. *Secular Society*,[87] states the reason for the rule in England: "because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit." It is submitted that the

[82]The American cases are collected in 21 A.L.R. 951. And see the article in 16 *California Law Review* (1928), at p. 478.

[83](1867) 96 Mass. 539.

[84]*Farewell* v. *Farewell*, (1892) 22 O.R. 573. But see *Re Knight* (*supra*).

[85]*Restatement of Trusts*, sec. 374 (j). Cf. sec. 374 (k).

[86]See, e.g., Scott, *Trusts*, sec. 374.4. And see the excellent note, "Charitable Trusts, Political Purposes" in 15 *Canadian Bar Review* (1937), at p. 566.

[87][1917] A.C. 406, at p. 442.

court has fully as scant means of judging whether *any* doctrine sought to be advanced will or will not be for the public benefit, for example, vegetarianism, or the attempt to heal the sick by faith in the teachings of Christian Science. And certainly it must be assumed, in a democratic state, that the laws will follow public opinion, so that the merits of a proposed change in the laws should be considered by the courts in the same light as a proposed change in public opinion.

CONCLUSION

It will be observed from this study that agreement is expressed or implied with the results which the courts have reached in almost all the cases in this field. It will also be noted, however, that there is disapproval of the reasoning by which the courts have reached these results, in many cases. Let us now see whether it is possible to base the conclusions on a sounder approach.

In discussing the cases, I have indicated from time to time my objections to various lines of reasoning which the courts have taken and statements which they have made. These objections may be grouped into at least four classes. (1) The most common and most harmful of these is the class of cases in which the courts have laid down the general rule that the testator's sincere belief in the beneficial nature of the object to be advanced is enough, and have then failed to make some qualification to the effect that this belief must be rational in some degree. Of this class are *Thornton* v. *Howe*, Lord Eldon in *Attorney-General* v. *Earl of Mansfield*, Chitty J. in *In re Foveau*, and *Re Orr*. That such a rule is incorrect seems clear in view of the result which has been reached in the cases which hold "irrational" trusts not charitable. That the statement of such a rule is harmful also seems clear: it has resulted, in later cases where there was an irrational belief involved, either in forced reasoning to avoid it, or in a direct repudiation of it which accentuates the apparent conflict of the cases. (2) There has been a tendency in many cases either to reason rather loosely in reaching the result, or to give virtually no reasons at all for the decision. *In re Hummeltenberg*, and the two majority judges in *Re Grove-Grady* are examples. This tendency again results in failure to resolve the apparent conflict in the cases. (3) The cases in this field display a fair share of decisions which attempt to avoid deciding the crucial issue, going instead on some more or less strained subsidiary ground, for example, *Kramph's Estate*. It would seem that this has been done in general to reach the right result where the presentation of the facts has been such as to make this difficult without flying in the face of the normal rule. (4) The

English cases have at times indicated an adherence to certain technical rules which it is believed are unsound and tend to limit too much the scope of charitable purposes, thus the statement by Lord Parker that the purposes of the Secular Society were *too vague* to be considered charitable, and the holding in *Re Jones* that the advancement of an abstract doctrine cannot be considered charitable unless identified with one of the three or four specific charitable purposes.

The formula which I would suggest to correct these statements and lines of reasoning, which, it is submitted, are unsound, has, I believe, been indicated in only two of the opinions discussed: that in *In re Carpenter's Estate*, and that of Lord FitzGibbon in *Re Cranston*. The former suggested that the testator's belief in the object which he seeks to advance as charitable must not be contrary to "the great body of opinion among sound thinking men." The latter suggested that the testator's belief must be "at least rational," and that the object must be neither illegal nor immoral, and must be "appreciably important." The *Restatement* suggests that the testator's belief must not be "irrational," and Scott adds to this[88] that the purpose may be considered charitable if it "may reasonably be thought" to benefit the community.

On the basis of the objections to the cases, and the above suggestions, the following conclusions are submitted: (*a*) a general formula may be stated to resolve the broad issue as to how far unreasonableness, or irrationality, or impracticality, or unpopularity of a purpose or the means selected to accomplish it will render an object not charitable; (*b*) the formula applies to all the various classes of charitable objects, i.e. educational, promotion of health, advancing of an abstract doctrine beneficial to the community, etc.; (*c*) the formula is, that if the testator sincerely believes that the object is beneficial, or tends to the advancement of education, etc., it will be considered charitable if (i) the object is neither positively illegal, nor against public policy, nor excessively unimportant, and (ii) the belief of the donor is not irrational as judged by the standards of a reasonably tolerant man of intelligence. The standards of this man must of necessity vary to some extent with the changing body of popular opinion, but must not do so to such a degree as to render him no longer a reasonably tolerant man of intelligence.

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[88]Scott, *Trusts*, sec. 374.7.